United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1184.

143

No. 2, SPECIAL CALENDAR.

JEREMIAH F. McCARTHY, MARY McCARTHY DALEY, AND JOHN J. McCARTHY, APPELLANTS,

vs.

JAMES F. McCARTHY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 21, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1902.

No. 1184.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 26, 1902.

In the Court of Appeals of the District of Columbia.

JEREMIAH F. McCARTHY ET AL.
vs.
JAMES F. McCARTHY.
No. 1184.

1 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. McCARTHY, Dec'd. No. 10295.

Stipulation.

It is this 24th day of December, 1901, hereby stipulated and agreed by and between James F. McCarthy and Katie McCarthy Brennan, by their attorneys of record, Messrs. Sheehy and Sheehy and Charles Bendheim, and Jeremiah F. McCarthy, Mary McCarthy Daley, and John J. McCarthy, by their attorney of record, Chapin Brown, that the record for appeal taken by the said Jeremiah F. McCarthy, John J. McCarthy, and Mary McCarthy Daley from the order of the court passed herein on the 24th day of December, 1901, may consist of: (1) The petition of the said James F. McCarthy, and (2) the answer thereto of Mary McCarthy Daley (the answers thereto of Jeremiah F. McCarthy and John J. McCarthy, being the same in substance as the answer of the said Mary McCarthy Daley, need not constitute a part of the record on appeal), and (3) the petition of Mary McCarthy Daley for letters of administration (the petition of Jeremiah F. McCarthy, being the same in substance as the petition of Mary McCarthy Daley, except that it prays for letters of administration to be issued to said Jeremiah F. McCarthy, need not constitute a part of the record for appeal), and (4) the answers and other papers accompanying the answer of James F. McCarthy and Katie McCarthy Brennan to the petition of the said Mary McCarthy Daley, and (5) this stipulation and any other papers on file that counsel for either of said parties may desire on notice given before record
2 is printed; that the briefs of the attorneys of record for the respective parties which have been filed in the office of the register of wills may be used in argument of the case in the Court of Appeals of the District of Columbia for the purpose of showing to the said Court of Appeals the matters and claims presented in argument to the supreme court of the District of Columbia, holding a special term for orphans' court business, but not to limit any further brief or arguments that may be made by counsel on appeal; that the said Katie McCarthy Brennan having by her an-

swers filed in the office of the register of wills, both to the petitions of James F. McCarthy and of Mary McCarthy Daley, waived any claim which she might have to the money on deposit in the National Bank of Washington and belonging to the estate of Mary T. McCarthy, deceased, it is further stipulated and agreed that one thousaid dollars of sand money so on deposit in said bank may be paid by said bank to the said James F. McCarthy, provided the court passes an order to this effect. This stipulation in reference to the payment of said thousand dollars is made without the said attorneys, Messrs. Sheehy and Sheehy and Charles Bendheim, or their clients, admitting that the said Katie McCarthy Brennan has any valid claim on said fund in bank.

SHEEHY & SHEEHY,
CHARLES BENDHEIM,
Attorneys for James F. McCarthy and Katie McCarthy Brennan.
CHAPIN BROWN,
Attorney for Jeremiah F. McCarthy, Mary McCarthy Daley, and Jno. J. McCarthy.

(Endorsement: Stipulation. Filed Dec. 24, 1901. Louis A. Dent, register of wills, D. C.)

3 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

Chapin Brown, Esq., attorney for Mary McCarthy Daley *et al.*

Please take notice that, pursuant to the provisions of the fifth section of the stipulation entered into by counsel for the respective parties as to what the record on appeal shall consist of in the above-entitled matter we desire the papers enumerated below, on file in said matter, to be included in said record, in addition to the papers specifically set forth in said stipulation:

1. The waiver of citation and consent of Katie McCarthy Brennan to the application of James F. McCarthy.
2. The affidavits of James Black, Bernard Leonard, Robert O'Neill, and James F. McCarthy.
3. The opinion of Mr. Justice Barnard rendered upon the matters and questions involved herein.
4. The decree of the court denying the prayers of the petitions of Jeremiah F. McCarthy and Mary McCarthy Daley, and granting letters of administration to James F. McCarthy.

SHEEHY & SHEEHY,
Attorneys for James F. McCarthy.

Service of a copy of the above notice is hereby acknowledged this 30th day of December, A. D. 1901.

CHAPIN BROWN,
Attorney for Mary McCarthy Daley et al.

(Endorsement: Notice as to papers on file desired to be included in record on appeal. . Filed Dec. 30, 1901. Louis A. Dent, register of wills, D. C.)

4 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

To the honorable the supreme court of the District of Columbia, holding a special term for orphans' court business:

Your petitioner, James F. McCarthy, respectfully represents as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia and files this petition in his own right as the husband and one of the next of kin of Mary T. McCarthy, deceased, as hereinafter set forth.

2. That heretofore, to wit, on the first day of July A. D. 1901, the said Mary T. McCarthy, late a citizen of the United States and a resident of the District of Columbia, departed this life in said District, as your petitioner is informed and believes and avers, intestate; that your petitioner does not know of any will or testament of said deceased; that he has made search among her effects and other places and inquiries of such persons as would tend to disclose the existence of a will or testament of said deceased, if any such there were, but no will or testament has been discovered.

3. That said decedent left surviving her as her heirs-at-law the following persons, to wit, Jeremiah McCarthy, a son, who resides at the corner of Gay and Harrison streets, in the city of Indianapolis, in the State of Indiana; Mary McCarthy Daly, a daughter, and John J. McCarthy, a son, both of whom reside at No. 1702
5 New Jersey avenue northwest, in the city of Washington, in the District of Columbia, and Katie McCarthy Brennan, a daughter, who resides at No. 701 Rhode Island avenue northwest, in the city of Washington, in the District of Columbia; that said heirs-at-law, together with this petitioner, also constitute the next of kin of said decedent; that your petitioner resides in the city of Washington, in the District of Columbia, at No. 1272 First street southwest.

4. That at the time of her death the only personal property of which the said decedent was possessed was the sum of about $4,000.00 deposited with a banking institution to her credit in this city and District.

5. That said decedent died seized and possessed of the following real estate situate, lying, and being in the city of Washington, in the District of Columbia, and known and described as and being lot numbered four (4), in square numbered six hundred and fifty (650), which said real estate is worth about $1,500.00 or $2,000.00.

6. Your petitioner further alleges that said decedent left no

debts except for medical attendance during her last illness, amounting to about $50.00, and her funeral expenses,.amounting to about $150.00.

7. Your petitioner further alleges that he is entitled to administer upon the personal estate of said decedent, and as her husband as aforesaid, under the law in such case made and provided, is entitled to the whole residue of the personal estate of said decedent after the payment of debts of and claims against the intestate. .

Wherefore, the premises considered, your petitioner prays:

1. That summons may be issued out of this honorable court, directed to the said Jeremiah McCarthy, Mary McCarthy Daly,
6 John J. McCarthy, and Katie McCarthy Brennan, commanding them to appear and show cause, if any they have, why letters of administration should not issue to your petitioner.

2. That if any of said next of kin or heirs-at-law shall be returned "not to be found" that an order of publication may — had against such in lieu of personal service of the summons.

3. That a decree may be passed by this honorable court granting letters of administration upon the estate of said decedent to your petitioner.

4. That upon the passing of the decree granting letters of administration to your petitioner that he may be allowed to file a special bond, in accordance with the statute in such case made and provided, conditioned for paying all debts, claims, and damages which shall be recovered against him as administrator.

5. For such other and further relief as the exigencies of the case may require and to the court may seem just and proper.

JAMES F. McCARTHY.

SHEEHY & SHEEHY,
Attorneys for Petitioner.

I, James F. McCarthy, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

JAMES F. McCARTHY.

Subscribed and sworn to before me this 23rd day of July, A. D. 1901.

RUTLEDGE WILLSON,
Notary Public, D. C.

[SEAL.]

(Endorsement: Petition of James F. McCarthy for letters of administration. Filed Jul- 23, 1901. Louis A. Dent, register of wills, D. C.)

7 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. —.

I, Katie McCarthy Brennan, one of the heirs-at-law and next of kin of Mary T. McCarthy, who departed this life at the city of Washington, District of Columbia, on the first day of July, A. D. 1901, intestate, being fully acquainted with the contents of the petition filed herein by James F. McCarthy, do hereby consent that letters of administration on the estate of said Mary T. McCarthy may issue to him; and I do also hereby waive summons, citation, publication, or other notice to me.

KATIE McCARTHY BRENNAN.

Witness-:
VINCENT A. SHEEHY.
FRANCIS P. SHEEHY.

(Endorsement: Waiver of citation by and consent of Katie McCarthy Brennan, one of next of kin. Filed Aug. 6, 1901. Louis A. Dent, register of wills, D. C.)

8 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295, Docket No. 28.

The answer of Mary McCarthy Daley to the petition of James F. McCarthy, filed in the above-entitled matter July 23rd, 1901.

In answer to said petition, this respondent says as follows:

1. I admit that the petitioner, James F. McCarthy, is a citizen of the United States and a resident of the District of Columbia, but I deny his right to file a petition in this cause by reason of his being the husband of my mother, the said Mary T. McCarthy, now deceased, and I deny that he is one of the next of kin of my said mother.

2. I admit that my said mother, Mary T. McCarthy, late a citizen of the United States and a resident of the District of Columbia, departed this life, as alleged in said petition, in said District on the 1st day of July, A. D. 1901. I can neither admit or deny, and therefore call for strict proof of the same, that she died intestate.

3. I admit that my said mother left surviving her as her heirs-at-law the persons whose names are set forth in the third paragraph of said petition, and I admit that the residences of said heirs-at-law are correctly stated in said petition. I admit that the said heirs-at-law constitute the next of kin of the said decedent, but I deny that the said petitioner, James F. McCarthy, is one of the next of kin of the said decedent. I admit that the said petitioner resides in the city

of Washington, in the District of Columbia, as set forth in the said petition.

9 4. I deny that at the time of her death the only personal property of which the said decedent was possessed was the sum of $4,000.00 deposited with a banking institution to her credit in this city, and on information and belief I aver the fact to be that the said decedent was possessed of much larger estate in personal property than as set forth in the said fourth paragraph of said petition, and I further aver the facts to be that the amount referred to as $4,000.00 deposited with a banking institution of this city is in fact between $4,400.00 and $4,500.00, and that this fact was well known to the petitioner at the time he signed and verified the said petition. The said petitioner was well aware of the name of the banking institution in which the said money was deposited, although the same is not disclosed in the petition. On information I aver the name of the banking institution to be the National Bank of Washington. I further aver on information and belief the fact to be that the said decedent left a large amount of personal property other than the amount of money deposited in bank, namely, a large amount of household furniture, bonds, jewelry, diamonds, &c.; and I further aver on information and belief the fact to be that the said decedent left in her house at the time of her death a large sum of money, which the petitioner has received and appropriated to his use, and I respectfully pray the court to require the said petitioner to disclose under oath the exact amount of money received by him after the death of the said decedent and found upon the premises occupied by the decedent during her life.

5. I admit that the decedent died seized and possessed of the real estate mentioned in the fifth paragraph of said petition.

10 6. I admit that the decedent left debts amounting to $50 and upwards at the time of her death, and funeral expenses amounting to about $150.

7. I deny that the said petitioner is entitled to administer upon the personal estate of the decedent, either by reason of his being the husband of the decedent or by reason of his claim of being one of the next of kin of the decedent, and I deny that the said petitioner is entitled to the whole residue or to any part of the personal estate of the said decedent after the payment of debts and claims against the said estate.

8. In further answer to said petition, this respondent says that the said decedent was in business for herself prior to her death for many years, and that she acquired a large amount of property, both real and personal, belonging to her own separate estate, free from the debts or any claims of her said husband, the said petitioner; that all of the business was conducted by her and in her own name, and that the property left by her at the time of her death was her sole and separate estate, and that the only persons entitled thereto are her children, whose names are set forth in the third paragraph of the said petition.

This respondent further says that the said petitioner is an im-

proper person to be appointed to administer on said estate, even though he should be eligible under the laws of distribution in force in this District to so administer; that the said petitioner is addicted to the habit of drinking intoxicating liquors to excess whenever opportunity is given him, and that his former wife, the decedent, and his said children have had to exercise care over the said petitioner in this regard; that the said petitioner has no business qualifications whatever to act as administrator, and that the said petitioner is not capable of managing his own estate or the
11 property of others; that the said petitioner was at one time convicted of perjury as shown by the following record, to wit, on February 9th, 1888, the said petitioner was indicted for perjury in the District of Columbia, as will more fully appear from the minutes recorded in Criminal Minutes No. 20, page 174, of the supreme court of the District of Columbia, and known as criminal case No. 17005; that on March 16, 1888, the said petitioner was convicted of said charge of perjury, as shown by the record in said Criminal Minutes No. 20, page 255; and as further shown by said Criminal Minutes at page 269, on March 20th, 1888, a motion for a new trial was made, and on June 23, 1888, the said motion was granted; that on July 3rd, 1888, the said defendant was again placed on trial, at which last-mentioned trial the jury disagreed and was discharged; that on October 26th, 1889, the United States attorney nolleprossed said case, as shown by said Criminal Minutes No. 21, at page 116.

This respondent therefore respectfully prays that the said petitioner be not appointed administrator of said estate of said decedent, and that some fit and proper person be appointed to administer upon the estate of the decedent.

MARY McCARTHY DALEY.

CHAPIN BROWN,
Atty. for respondent.

DISTRICT OF COLUMBIA, *ss*:

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the matters and things therein set forth upon my own knowledge are true, and those set forth upon information and belief I believe to be true.

MARY McCARTHY DALEY.

12 Subscribed and sworn to before me this 5th day of August, A. D. 1901.

[SEAL.]

CHAS. H. BAUMAN,
Notary Public, D. of C.

(Endorsement: Answer of Mary McCarthy Daley to the petition of James F. McCarthy. Filed Aug. 6, 1901. Louis A. Dent, register of wills, D. C.)

13 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295, Doc. No. 28.

To the supreme court of the District of Columbia, holding a special term for orphans' court business :

The petition of Mary McCarthy Daley respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia, and files this petition in her own right as one of the children and also one of the next of kin of her mother, Mary T. McCarthy, now deceased.

2. That heretofore, to wit, on or about the first day of July, 1901, the said Mary T. McCarthy, late a citizen of the United States and a resident of the District of Columbia, departed this life in the said District; that your petitioner does not know of any will or testament of said decedent, and upon information and belief she avers that the said decedent died intestate.

3. That said decedent left surviving her as her only heirs-at-law, who are also her next of kin, the following persons, to wit: Jeremiah McCarthy, a son, who resides in the city of Indianapolis, in the State of Indiana, and at the corner of Pine and Harrison streets; John J. McCarthy, a son, who resides in the city of Washington and District of Columbia, and Katie McCarthy Brennan, a daughter, who resides in said city of Washington, and also your petitioner, Mary McCarthy Daley, who resides in said city of Washington, and that the said decedent left no other next of kin or heirs-at-law.

14 4. That at the time of her death the said decedent left in personal property, consisting of household furniture, jewelry, diamonds, bonds, and other property, estimated at $2,000.00 and upwards, and she also left in cash in a banking institution in this city about $4,500.00, and upon information and belief your petitioner avers that she also left in cash at her late residence another large sum of money, the amount of which is unknown to your petitioner.

5. That the said decedent died seized and possessed of real estate in the District of Columbia and known and described as lot numbered 4, in square 650, improved by a frame dwelling-house, and also other real estate situate in the District of Columbia, the description and value of which is not known to you- petitioner.

6. Your petitioner further avers that decedent left debts amounting to $50 and upwards and funeral expenses amounting to about $150.

7. Your petitioner avers that she is entitled, as one of the next of kin of said decedent, to administer upon the personal estate of said decedent, under the law in such case made and provided, and she desires also that such letters may be issued to her and her husband, John C. Daley, and also that her brother, the above-named Jeremiah McCarthy, shall be joined with her and her said husband in such administration.

Your petitioner therefore prays:

I. That letters of administration may be granted to her and her said husband, John C. Daley, and also that the said Jeremiah McCarthy may be joined with them in the administration of the above estate.

II. That an account may be taken under the direction of this honorable court of all the personal property, including money, belonging to said estate, as well as of the real estate belonging to said estate.

15 III. That your petitioner may have such other and further relief as the nature of her case may require.

And your petitioner will ever pray.

MARY McCARTHY DALEY.

CHAPIN BROWN,
Att'y for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition, by me subscribed, and know the contents thereof, and that the matters and things therein set forth of my own knowledge are true, and those set forth of information and belief I believe to be true.

MARY McCARTHY DALEY.

Subscribed and sworn to before me this 5th day of August, A. D. 1901.

CHAS. H. BAUMAN,
Notary Public, D. of C.

[SEAL.]

(Endorsement: Petition of Mary McCarthy Daley for letters of administration and for an account of the personal property and real estate. Filed Sep. 10, 1901. Louis A. Dent, register of wills, D. C.)

16 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. McCARTHY, Deceased. No. 10295, Doc. 28.

Answer of Katie McCarthy Brennan to the petitions of Mary McCarthy Daly, John C. Daley, and Jeremiah F. McCarthy for letters of administration on said estate.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

1. She admits the citizenship and residences of petitioners, as stated in the 1st paragraph of said petition; also that Mary McCarthy Daly and Jeremiah F. McCarthy are children of the decedent.

2. She admits the statements in the second paragraph of said petitions contained.

3. She admits that the decedent left surviving her the following

persons, claimed in said petitions to be her only heirs-at-law and next of kin, to wit, John J. McCarthy, a son, who resides in Washington, District of Columbia; Mary McCarthy Daly, a daughter, who also resides in the said city of Washington; Jeremiah F. McCarthy, a son, who resides in the city of Indianapolis, State of Indiana, and your respondent, Katie McCarthy Brennan, a daughter, who resides in the said city of Washington. She also states that said decedent, Mary T. McCarthy, left surviving her a husband, James F. McCarthy, the father of petitioners and respondent, who resides in the said city of Washington.

17 4. Answering the 4th paragraph of said petitions, respondent states that decedent left no household furniture so far as she is aware, nor did she leave, to the knowledge of respondent, any bonds; that she left some jewelry of little value, which had been given her by her husband; that there was, at the time of the death of the decedent, in a banking institution in this city about the sum of $4,500 to her credit; that whilst said money was in bank to the credit of decedent respondent has been informed and believes that said money was, in fact, the property of her husband, the said James F. McCarthy, it having been taken from his business by decedent and placed with his consent to her credit in bank; respondent has no knowledge as to what money, if any, was left by decedent at her late residence, but on information and belief she avers that said decedent left no money whatsoever there.

5. She admits that said decedent died seized and possessed of real estate in the District of Columbia known as lot numbered 4, in square numbered 460, improved by a frame dwelling; she has no knowledge of any other real estate of which said decedent died seized and possessed.

6. She admits the allegations in the 6th paragraph of said petitions contained.

7. She denies that said petitioners, or either or any of them, are entitled to be granted letters of administration on the estate of said decedent.

She alleges that the said James F. McCarthy, as the surviving husband of the decedent, Mary T. McCarthy, is the sole party interested in said estate, and as such he is entitled to have letters of administration granted unto him.

KATIE McCARTHY BRENNAN.

And having fully answered, etc.

CHAS. BENDHEIM, *Att'y.*

18 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have heard read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

KATIE McCARTHY BRENNAN.

Subscribed and sworn to before me this 21st day of September, 1901.

THOS. H. CALLAN,
[SEAL.] *Notary Public.*

(Endorsement: Answer of Katie McCarthy Brennan to the petition of Mary McCarthy Daly *et al.* Filed Sep. 23, 1901. Louis A. Dent, register of wills, D. C.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

The answer of James F. McCarthy to the writ of citation issued against him in the above-entitled matter, and also to the petitions of Jeremiah F. McCarthy and Mary McCarthy Daley filed herein.

For answer to said writ and to said petitions, this respondent says:

1. He admits the residences and citizenship of the said Jeremiah F. McCarthy and Mary McCarthy Daley and John C. Daley, her husband. He admits that said Jeremiah F. McCarthy and Mary McCarthy Daley are children and next of kin of Mary T. McCarthy, deceased; they are also the children of this respondent. He denies the right of said petitioner to file their said petitions for administration on the estate of the said Mary T. Mc*Mc*Carthy.

2. He admits paragraph two as to the date of the death of said Mary T. McCarthy, and he believes, so far as he has been able to ascertain, that the said Mary T. McCarthy did die intestate; that no will or testament of said decedent has been found, although this respondent made thorough search among her effects after her decease.

3. He admits that said decedent left surviving her the persons who are described in the third paragraph of their said petitions as the heirs-at-law and next of kin of said decedent. He also
20 admits that their relationship and residence are correctly set forth. Further answering said paragraph, this respondent says that in addition to said persons said decedent left surviving her this respondent, who was at the time of her death her husband and the father of all the persons named in said petitions as the heirs-at-law and next of kin.

4. He denies that said decedent left at the time of her death any household furniture or bonds. He admits that she did leave a small quantity of jewelry of inconsiderable value, and which had been given to her by this respondent during their married life. He denies that she left personal property of the value of $2,000.00 and upwards. He avers that the household furniture which was in and

upon the premises where said decedent and this respondent resided at the time of decedent's death was and is in fact the property of this respondent. He also admits that at the time of the death of said decedent there was deposited to her credit with a banking institution in this city, namely, the National Bank of Washington, about $4,500.00—in fact, $4,425.00—but he denies that said money was the property of said decedent. Further answering said paragraph, this respondent says that said sum of money is in fact the money of this respondent, and is the proceeds and profits of the business conducted by this respondent for many years in this city, and in which said decedent, as his wife, aided and assisted him; that in accordance with a domestic custom, which dates back to the time of their marriage in 1854, said decedent was permitted, with the knowledge and consent of this respondent, to take said money from time to time and deposit it in her own name and to her own credit, but he denies absolutely that there ever was any intention or agreement between said decedent and this respondent that said moneys so deposited should become the sole and separate property and estate of said decedent, but, on the contrary, he avers
21 that said money was always to remain the property of this respondent, and was drawn upon by his said wife, in recognition of his right, whenever he directed her either for his business or personal needs. He denies that said decedent left a large sum of money in cash at her late residence at the time of her death. He distinctly avers that any money that was in and upon the premises at that time was the property of this respondent.

5. He admits that said decedent died seized and possessed of the real estate specifically described in said paragraph which was purchased by this respondent and conveyed by him to her, but he denies that she died seized and possessed of any other real estate, but if such is the fact this respondent has no knowledge thereof.

6. He admits paragraph 6 as to the debts of said decedent.

7. He denies that either of said petitioners is entitled, as next of kin, to administer upon the personal estate of said decedent. He avers that under the law in force in this District he is advised that at the time of the death of his said wife, as her husband, he became entitled absolutely in his own right to all of the personal property of which she died possessed, and that said petitioners and the other persons named as next of kin of said decedent are not entitled to any interest therein whatsoever.

8. Further answering said petitions, this respondent says that the petitioner, Jeremiah F. McCarthy, was indicted, as this respondent is informed and believes, under the name of Jerry Jones, in Washington county, in the State of Maryland, for the crime of housebreaking or burglary, about 1868, and while in jail at Hagerstown awaiting trial he escaped and was never apprehended, and, so
22 far as this respondent is informed, the charge made in the indictment may be still pending against him. Further answering said petitions, this respondent says that John C. Daley, husband of the petitioner Mary McCarthy Daley, and in whose behalf

letters of administration are also asked in his capacity of husband to the petitioner, and who is now a lieutenant of the Metropolitan police force, was by the police court held under bond to appear in this court to await the action of the grand jury on, to wit, May 11, 1893, upon a charge of perjury, and that on, to wit, June 8, 1893, said charge was ignored by the grand jury. This proceeding is known as cause No. 19356, criminal docket No. 19.

Wherefore, having fully answered, this respondent prays that the petitions of said Jeremiah F. McCarthy and Mary McCarthy Daley may be dismissed and that letters of administration upon the estate of said decedent may be issued to this respondent, as prayed for in his petition filed herein.

JAMES F. McCARTHY.

SHEEHY & SHEEHY,
Attorneys for Respondent James F. McCarthy.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JAMES F. McCARTHY.

Subscribed and sworn to before me this 23rd day of September, A. D. 1901.

[SEAL.] RUTLEDGE WILLSON,
Notary Public, D. C.

(Endorsement: Answer of James F. McCarthy to petitions of Jeremiah F. McCarthy & Mary McCarthy Daley. Filed Sep. 23, 1901. Louis A. Dent, register of wills, D. C.)

23 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. McCARTHY, Deceased. No. 10295.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, Rutledge Willson, a notary public in and for the District aforesaid, James F. McCarthy, who, being first duly sworn according to law, deposes and says that he is a citizen of the United States and resides at No. 1272 First street southwest, in the city of Washington, District of Columbia, and that he is the applicant for letters of administration on the estate of said Mary T. McCarthy, deceased, who was his wife; that before becoming a citizen of the United States he was a letter-carrier in the postal service of Great Britain; that he was a recruiting sergeant in the Kerry regiment of volunteers of the English army during the Crimean war, and from 1854 to 1865 he was a member of the police force of the city of London, England, attached to the Scotland

Yard; that he was married to the said Mary T. McCarthy in Ireland in the year 1854, and they lived together continuously as husband and wife until the death of said decedent, which occurred in this city and District on the first day of July, 1901; that of the twelve children born to them only four, to wit, Jeremiah McCarthy, Mary McCarthy Daley, John J. McCarthy, and Katie McCarthy Brennan, who are the respondents herein, are now living; that about ten months before her death, about October, 1900, the said decedent suffered a stroke of paralysis, which so impaired her mental
24 faculties as to render her incapable of understanding the nature of her own acts; that after her decease this affiant made a thorough search among her effects, in her trunks and the drawers of her bureau, where she kept her papers, for the purpose of discovering whether or not she had left a will or testament, but that he did not find any such will or testament or any paper-writing that might be construed to be such; that, so far as it has been possible for this affiant to ascertain, the said decedent died intestate.

This affiant admits that the exact amount of money deposited to the credit of said decedent is, as he is informed, $4,425.00, and that the same is deposited with the National Bank of Washington. He denies, however, that said money is the sole and separate property and estate of said decedent; that, on the contrary, he alleges the fact to be that said money is the property of this affiant; that ever since his marriage to her, in 1854, he had been in the habit of permitting her to take his income in order that it might be applied to their domestic uses and also for the purpose of saving as much thereof as might be possible; that ever before he came to the United States, while residing in the city of London, she had deposited the savings of his wages as a police officer in her own name and with his consent, but never was there any intention that the same should become her property absolutely, to his entire exclusion, if she *do* desired; that for many years this affiant was in business in this city and District, first in the grocery and liquor business and then in the liquor business alone, which he continued up to 1895, when he retired from business entirely; that the money that stood on deposit, as aforesaid, at the time of her death to her credit was money that was made by him in his business and in which she had aided and assisted him as his wife, and following their usual cus-
25 tom in their domestic arrangements was allowed to be deposited in her own name and to her credit; he denies absolutely, however, that there ever was any intention or agreement between this affiant and said decedent whereby the money so deposited should become her sole and separate estate, but that it was well understood between them that this affiant could at any time for his business or personal uses have the expenditure and application of it, and that is was frequently drawn upon by her at his direction in recognition of this right on his part.

Affiant admits that said decedent left a few articles of jewelry of inconsiderable value, consisting of one or two finger rings and a small gold watch which were presents to her from this affiant dur-

ing their married life, and which he is advised and believes belong now absolutely to him. He denies that she left any household furniture, stocks, and bonds, the household furniture in their house being the property of this affiant. He denies also that at the time of her death she left a large amount of money in the house, but that at the time of her death there was in the house about $25.00 which was the property of this affiant. Affiant further denies that said decedent ever acquired a large amount of personal and real property; that she never had any separate income nor any other means of acquiring the same except through this affiant and his business; that all the property possessed by said decedent she acquired through this affiant permitting to have the same; he denies also that she was seized of any other real estate than that described in his petition, viz., lot 4, in square 650, which was purchased by this affiant himself and conveyed by him to her; that if she owns any other real estate this affiant has no knowledge of it.

This affiant further states that he is fully qualified and competent to administer on said estate, and he denies as maliciously false
26 the charge that he is addicted to the use of intoxicating liquor to excess; that his use of intoxicants has always been with moderation as with the rights of every person. He further says that his son, John J. McCarthy, who makes this charge with the others in his answer, is himself an habitual drunkard and has been arrested several times for being drunk and disorderly, and on the night that said decedent died he came to this affiant's house in a drunken and boisterous condition and wanted to thrash this affiant, his own father, and his sister Katie, and disturbed the neighborhood by his cursing and disgraceful conduct.

This affiant denies that there is any record of a conviction on the charge of perjury standing of record against him. He admits that he was tried on such a charge, which was vindictively made, but that he was not guilty of the offense; that after the court had set aside one verdict in his favor, and the second trial resulted in a disagreement of the jury, a *nolle prosequi* was entered in the case by the district attorney.

This affiant further says that Jeremiah F. McCarthy, who has applied for letters of administration on the estate of said deceased, was indicted about the year 1868 in Washington county, Maryland, under the name of Jerry Jones, for the offense of house-breaking or burglary, and while confined in jail he made his escape and was never apprehended; that so far as this affiant's knowledge extends the said indictment may be still pending against him. Affiant also says that John C. Daley, in whose behalf letters of administration are asked as the husband of Mary McCarthy Daley, and who is now a member and lieutenant of the Metropolitan police force, was, on, to wit, the 11th day of May, 1893, held under bonds by the police court, to appear in this court exercising its criminal jurisdiction, to await the action of the grand jury upon a charge of perjury; that afterwards said charge was ignored by said grand jury.

JAMES F. M'CARTHY.

27 Subscribed and sworn to before me this 23rd day of September, A. D. 1901.

RUTLEDGE WILLSON,
Notary Public, D. C.

[SEAL.]

(Endorsement: Affidavit of James F. McCarthy. Filed Sep. 23, 1901. Louis A. Dent, register of wills, D. C.)

28 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

DISTRICT OF COLUMBIA, *To wit*:

Personally appeared before —, a notary public in and for the District aforesaid, James Black, who, being first duly sworn according to law, deposes and says that he is a citizen of the United States and a resident of the District of Columbia; that he is the engineer in charge of the works of the Washington Gas Light Company, situated at the corner of K and First streets southwest, and that he also resides there; that he has known James F. McCarthy for about twenty-five years; that this affiant lived nearby the said McCarthy, and during all the time that he has known him he has never seen him drunk; that said McCarthy's children seldom came to see him, and therefore could not have exercised much care over him; that said McCarthy was in business for a long time, and his business was conducted under his name; that affiant also knew Mrs. Mary T. McCarthy, wife of the said James F. McCarthy, and the decedent in this case, but he never knew of her being in business for herself; this affiant considers James F. McCarthy capable of managing his own business affairs.

JAMES BLACK.

Subscribed and sworn to before me this twenty-third day of September, A. D. 1901.

EVA J. DOLAN,
Notary Public, Wash., D. C.

[SEAL.]

(Endorsement: Affidavit of James Black. Filed Sep. 24, 1901. Louis A. Dent, register of wills, D. C.)

29 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a notary public in and for the District aforesaid, Robert O'Neill, who, being first duly sworn accord-

ing to law, deposes and says that he is a citizen of the United States and resides at No. 479 "F" street southwest, in the city of Washington, District of Columbia; that he is a contractor and builder and real-estate owner; that he has known James F. McCarthy for about twenty years, during which time he has frequently seen him, and he has never seen him under the influence of intoxicating liquor.

ROBERT O'NEILL.

Subscribed and sworn to before me this twenty-third day of September, A. D. 1901.

EVA J. DOLAN,
[SEAL.] *Notary Public, Wash., D. C.*

(Endorsement: Affidavit of Robert O'Neill. Filed Sep. 24, 1901. Louis A. Dent, register of wills, D. C.)

30 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a notary public in and for the District aforesaid, Bernard Leonard, who, being first duly sworn according to law, deposes and says that he is a citizen of the United States and a resident of the District of Columbia; that he is engaged in the real-estate business, his office being located at No. 530 Four-and-a-half street southwest; that he has been so engaged for a period of about eighteen years; that he has been personally acquainted with James F. McCarthy, who resides at the northeast corner of First and N streets southwest, for about twenty years; that during this period he has seen him a great many times and has never seen him under the influence of liquor.

BERNARD LEONARD.

Subscribed and sworn to before me this twenty-third day of September, A. D. 1901.

EVA J. DOLAN,
[SEAL.] *Notary Public, Wash., D. C.*

(Endorsement: Affidavit of Bernard Leonard. Filed September 24, 1901. Louis A. Dent, register of wills, D. C.)

31 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased.
No. 10295, Doc. No. 28.

The joint and several answer of Jeremiah F. McCarthy and John J. McCarthy to the petition of Mary McCarthy Daley, heretofore filed in the above-entitled matter.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

1, 2, 3, 4, 5, & 6. We admit the truth of the allegations contained in paragraphs 1 to 6, both inclusive.

7. In answer to the allegations contained in the 7th paragraph of said petition, we admit that the petitioner, Mary McCarthy Daley, is, together with the other sons and daughters of the said decedent, entitled, as one of the next of kin, to administer upon the personal estate of the said decedent, but, in case the said Mary McCarthy Daley is appointed, we respectfully pray the court to appoint the respondent, Jeremiah F. McCarthy, with her in such administration, and we ask this without the said Jeremiah F. McCarthy waiving any of his rights to administer upon the personal estate of the said decedent, either alone or jointly with others who may be nominated and appointed by this honorable court to administer.

JEREMIAH F. McCARTHY.
JOHN J. McCARTHY.

STATE OF INDIANA,
City of Indianapolis, } *ss:*

I do solemnly swear that I have read the foregoing answer
32 by me subscribed and know the contents thereof, and that the matters and things therein set forth upon my own knowledge are true and those set forth upon information and belief I believe to be true.

JEREMIAH F. McCARTHY.

Subscribed and sworn to before me this — day of September, A. D. 1901.

[SEAL.]

OBIE J. SMITH,
Notary Public in and for the City of Indianapolis, State of Indiana.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the matters and things therein set forth upon my own knowledge are true, and those set forth upon information and belief I believe to be true.

JOHN J. McCARTHY.

Subscribed and sworn to before me this 23rd day of September, A. D. 1901.

[SEAL.]

CHAS. H. BAUMAN,
Notary Public, D. of C.

(Endorsement: Joint and several answer of Jeremiah F. McCarthy and John J. McCarthy to the petition of Mary McCarthy Daley. Filed Oct. 11, 1901. Louis A. Dent, register of wills, D. C.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

This cause coming on to be heard upon the petition of James F. McCarthy, surviving husband of Mary T. McCarthy, deceased, and the answers thereto, respectively, of Jeremiah F. McCarthy, Mary McCarthy Daley, John J. McCarthy, and the waiver of citation and consent of Katie McCarthy Brennan, the children and next of kin of said deceased, and also upon the petitions of the said Jeremiah F. McCarthy and Mary McCarthy Daley, and the respective answers thereto of the said James F. McCarthy, Jeremiah F. McCarthy, Mary McCarthy Daley, John J. McCarthy, and Katie McCarthy Brennan, and having been argued by counsel for the respective applicants and duly considered, and it appearing that the said Mary T. McCarthy departed this life, intestate, at the city of Washington, District of Columbia, on the first day of July, A. D. 1901, it is, by the court, this 24th day of December, A. D. 1901, adjudged, ordered, and decreed that the prayers of the petitions of the said Jeremiah F. McCarthy and Mary McCarthy Daley be, and the same are hereby, denied.

It is further adjudged, ordered, and decreed that the administration of the estate of said deceased be, and it is hereby, granted unto the said James F. McCarthy, and that letters of administration upon said estate issue to him; provided he shall first execute and file his bond to the United States of America in the penal sum of five thousand dollars, with sufficient surety or sureties, to be approved by this court, conditioned for paying all debts, claims, and dam-

34 ages which shall be recovered against him as administrator.

JOB BARNARD, *Justice.*

From the above decree the said Jeremiah F. McCarthy, John J. McCarthy, and Mary McCarthy Daley pray separate or joint appeals to the Court of Appeals, which appeals are allowed and penalty of appeal bond fixed at five thousand dollars, to operate as supersedeas.

JOB BARNARD, *Justice.*

(Endorsement: Decree dismissing petitions of Jeremiah F. McCarthy and Mary McCarthy Daley and granting letters of administration to James F. McCarthy. Filed Dec. 24, 1901. Louis A. Dent, register of wills, D. C.)

35 In the Supreme Court D. C., Special Term for Orphans' Court Business.

In re Estate of MARY T. MCCARTHY, Deceased. No. 10295. Administrations.

In this case it appears that the intestate was a married woman, who left real and personal property in this District and left surviving her as claimants of her estate her husband and two sons and two daughters, all of whom are adults and all reside in this District except one son, who resides in Indianapolis, Indiana.

The husband filed a petition for appointment as administrator and one of the children, a daughter, filed a waiver of citation and consented to the appointment of her father. The other children were notified by summons or publication and they all filed answers objecting to the appointment of their father and disputing his right to have any interest in or title to the estate left by their mother.

One daughter and one son also filed separate petitions, in which each claimed the right of administration, and to which the father and one daughter filed answers objecting to their appointment, and the other two children filed answers consenting that the brother and sister be appointed jointly.

Charges of unfitness are made against all the applicants for appointment by those opposing them, except as to the daughter, Mrs. Daly.

It is claimed by the husband that the personal estate of his deceased wife devolves upon him, and that under the law he is entitled to the same without administration, and inasmuch as it is his property under the law, he claims that he should be ap-

36 pointed administrator and allowed to give the special bond to pay debts.

This contention is made by virtue of the act of Maryland of 1798, ch. 101, sub. ch. 5, secs. 8 and 9 (Abert's Compiled Statutes D. C., p. 14, sec. 47) and by the authority of the supreme court D. C. in general term, as declared in the case of Chadsey *v.* Fuller, 6 Mack., 117, and it is also claimed the same rule is laid down in the earlier statutory law of England and by many reported cases.

As against this, counsel for the contesting children claim that the estate of their mother was such as their father had no interest in whatever while the mother was living, and hence that he could have no interest in it now under the proper construction of the statute now in force in this District relating to the rights of married women.

Also that the husband of the intestate is not a fit or competent man to have the appointment of administrator in any event.

Counsel also contend that the only proper practice for the determination of the question of fitness of the petitioner and character of the estate in question is to have issues framed and sent to a jury for trial, under the statute of Md. of 1798 (Dennis Prob. Law, p. 105, 106) (Abert's Comp. St. D. C., 301, 302, sec. 54, 55).

By the first of these sections, the court may direct a plenary pro-

ceeding "whenever either of the parties having a contest in the orphans' court shall require," and the second section directs the procedure in such case.

These sections both speak of the "parties" or "party" as if there were a proper adversary proceeding, and I think the statute must refer to cases where a personal representative has already been appointed, in cases of intestacy and in cases of alleged wills, to
37 such as have been filed by some one for probate.

In case of intestacy there is no one to represent the estate of the decedent until the court shall make an appointment; and I can hardly believe that the legislature contemplated that the various applicants for the position of administrator should be considered as "parties" in the sense of adversaries contending for adverse rights in property.

The statute, it seems to me, authorizes the court to pass upon the qualifications of the various candidates and to use some discretion in the selection to be made, guided by certain general rules which the law recognizes as entitling to preference.

Entertaining this view, I feel that it would be improper to frame issues and direct a jury trial to ascertain which of the three petitioners in this case should be appointed.

Feeling bound by the authorities to hold that the husband is entitled to the personal property of his intestate wife, notwithstanding the statute relating to the rights of married women, and that there is nothing in the character of the estate as shown by the papers herein (the same being money in bank deposited in the name of the wife) which will make this case an exception to the general rule heretofore in force in this jurisdiction, I am disposed to appoint the husband administrator, as prayed for in his petition.

(Endorsement: Opinion of Mr. Justice Barnard. Filed Dec. 23, 1901. Louis A. Dent, register of wills, D. C.)

38 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295, Doc. No. 28.

Brief of Authorities and Argument on Behalf of the Next of Kin of Mary T. McCarthy, Deceased.

Facts.

Mary T. McCarthy recently died intestate, leaving a personal estate and leaving surviving her a husband and four children. The husband has applied for letters of administration and also certain of the children have applied for letters of administration on her personal estate. There are allegations in the several petitions and answers of husband and next of kin (children) of the intestate raising issues, which, it is respectfully submitted, are necessary to be

determined in the manner provided by law before the case is ready for hearing upon the question as to whom shall be appointed administrator.

Questions Raised by the Pleadings.

(First.) As to the competency, generally, of one of the applicants for letters of administration. (Second.) As to whether the husband, in his lifetime, did not relinquish all right to the estate of the wife. In which case he would have relinquished his right to ad-
39 minister upon the estate. (Third.) As to the extent and nature of the estate to be administered upon.

The laws of Maryland in force in the District of Columbia explicitly provide how these questions of fact shall be determined. The provision of the act of Maryland of 1798, cited in Dennis' Probate Law, pages 105 and 106, sects. 16 and 17, is as follows:

"Whenever either of the parties having a contest in the orphans' court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation), and if the party refuse to answer on oath (or affirmation, as the case may require), to any matter alleged in the bill or petition, and proper for the court to decide upon, the said party may be attached, fined, and committed, or his property may be attached and sequestered as aforesaid.

"And on such plenary proceedings all the depositions shall be taken in writing, and recorded; and in case either party shall require, the court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances for trying the same; and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses; and the power of the court of law, and proceedings thereto relative, shall be as hereinbefore directed respecting the trial of issues; and the orphans' court shall give judgment or decree upon the bill and answer, or upon bill, answer, depositions, or finding of the jury; and in all cases of contest the orphans' court may award costs to the party in their opinion entitled thereto, and may compel payment by attachment of the body, and fine, or attachment and sequestration, as aforesaid, of the property."

Also cited in Abert's Comp. Stat. D. C., pp. 301 and 302, sects. 54 and 55, construed in Pollard *vs.* Mohler, 55 Md., 284; *in re* Estate of Atwood, 2 App. D. C., 74; Dugan *vs.* Northcutt 7, App. D. C., 351.

Under the recent act of Congress (June 8, 1898) these issues are triable by jury in the orphans' court instead of by a jury in the circuit court.
40 The act of 1798 also gives the right of appeal from the judgment of a court on any question of fact at issue decided by the court (sect. 55, Abert's Comp., 302, as construed by the Supreme Court in Ormsby *vs.* Webb, 134 U. S., 47, and Campbell *vs.* Porter, 162 U. S., 478).

If it should be determined under the issues of facts raised by the pleadings that the husband, petitioner, had *relinquished* in his lifetime any rights to the property in question, then he would not be entitled to administer.

It is said in the case of Fowler *vs.* Kell, 14 Sm. & M., 68, cited in Williams on Ex'rs, vol. 1, p. 530, to note commencing on p. 529, under head of "surviving husband:"

"The husband's right to administer is lost with his right to the property of the wife."

See also to same effect Schouler's Ex'rs & Adm'rs, 2nd ed., sect. 98, note 3, at p. 129, where it is said:

"For the general principle is that the right to administer follows the interest in the estate."

See also to same effect the cases cited in Am. & Eng. Encyl. Law, 2nd ed., vol. II, p. 769, note 4, as follows:

Marshall *vs.* Beall, 6 How. (U. S.), 70, from this District; Ward *vs.* Thompson, 6 G. & J. (Md.), 349; Allen *vs.* Humphrys, 8 Prob. Div., 16. See also Prout *vs.* Roby, 15 Wall., 472 (from this District), cited more fully below, and Jackson *vs.* Jackson, 91 U. S., 122; Saxton *vs.* Wheaton, 8 Wall., 229 (from this District).

It is respectfully submitted that there are sufficient allegations in the pleadings, which, if proven under the issues to be framed and tried, the husband would be held to have waived any rights
41 whatever he had to the personal property involved.

The allegations of the pleadings are as follows: The husband filed his petition, setting up that the money in a banking institution, amounting to about $4,500.00, was the *property of his wife* and was her separate estate, and praying for letters of administration to be issued to him. If he had *voluntarily* given this to her (his wife) during her lifetime, he had thereby relinquished his right to it, and at her death it would pass to her next of kin, and he would not have the right to administer upon it.

One of the questions, then, to be determined by the issue of facts is: Assuming the facts in reference to this property to be as set out in the husband's answer to the petitions of the children, did the husband not give this property to his wife in her lifetime, and in such a way as to relinquish all his right to the property?

I respectfully submit that the allegations in the pleadings show that he did. The husband's sworn petition (first paper filed by him) alleges that the money was the property and separate estate of his wife. His subsequent pleadings (answer to the daughter's and sons' petitions) allege that the property was his own. The language of the answer of the husband is as follows: "Further answering said paragraph, this respondent says that the said sum of money is, in fact, the money of this respondent, and is the proceeds and profits of the business conducted by this respondent for many years in this city, and *in which said decedent, as his wife, aided him.*"
42 Notwithstanding this allegation now made, we find the money in question *deposited in bank*, subject to her check and disposal at the time of her death, and we find that the husband has sworn

in his petition first filed that it was the wife's property. If it ever was his he had the right and power to give it to her, and thereby relinquish all claim to it, and this he did.

Shea *vs.* McMahon, 16 App. D. C., 65.

Jackson *vs.* Jackson, 91 U. S., 122 (earnings of the wife, from this District).

Sykes *vs.* Chadwick, 18 Wall., 141 (from this District).

In the case of Sykes *vs.* Chadwick (above), the husband and another had given to the wife their joint promissory note, and the court, speaking through Mr. Justice Bradley, say:

"We may, therefore, regard the transaction under the consideration as valid and binding in equity, both on the defendant and the *husband of the plaintiff.* The note given to the plaintiff was the fruit of this transaction. The transaction itself was a good and sufficient consideration for the note. The latter is her separate property, as much so as an equal amount of money would have been, *if it had been placed by the vendors to her credit in bank.* She having performed her part of the agreement, there became due to her so much money for her separate use, and as her separate property. The note is no part of the contract by which her dower was released. It is a mere security given to her for the money growing due to her out of that contract. Her husband and his copartner became indebted to her, and gave this note as her separate property. Such a note must be just as valid as if she had lent them the amount out of her separate estate, and taken their note as security for the payment of it. The transaction is virtually the same as if they had paid her the money, and she had lent it to them on the note in question."

In the above case of Shea *vs.* McMahon, the court, speaking
43 through Chief Justice Alvey, at page 73, say:

"It is not claimed or pretended that there were any creditors of John F. Cullinane to be prejudicially affected by the conveyance to the wife; and therefore, whether the conveyance of the property to her by the husband was by way of *voluntary* settlement or was made on consideration of her relinquishing her contingent right of dower in property previously conveyed to third parties by the husband, or upon her agreement so to convey to extinguish her dower, is quite immaterial; as in either case, or upon both considerations combined, the conveyance to the wife was perfectly good and valid, *as against the husband,* his heirs-at-law, and against his devisees and trustees claiming under his will. It is quite unnecessary, therefore, to inquire as to the fact, whether the conveyance of the wife is made upon one of these considerations or the other. Either was sufficient; and from the date of the deed from Noonan and wife to the complainant the estate in the lots was vested in the latter as her estate, free from the control of her husband and subject to her power of sale or devise; citing Sykes *v.* Chadwick, 18 Wall., 141; Hitz *vs.* Nat. Met. Bank, 111 U. S., 722; Hamilton *v.* Rathbone, 175 U. S., 414."

It will be seen by the above-cited cases decided by our own courts

and by the U. S. Supreme Court in cases arising in this District, that it is conclusively determined that a husband can give or convey property, either real or *personal*, direct to his wife, and when this is done absolutely the husband relinquishes for all time all his rights or interest in the property (marital or otherwise) so given or conveyed. On this point, in case of Jackson *vs.* Jackson, 91 U. S., 122 (from this District, above cited), the Supreme Court, through Mr. Justice Field, say:

"Although the money which the wife had at her marriage and her subsequent earnings is the property of the husband, he may allow her to invest them for her own use, so as to be beyond his reach and control.

"No presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise, where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case *of a husband for his wife*, or a father for his child."

(Syllabus.)

To the same effect is the case of Sexton *vs.* Wheaton, 8 Wheat., 229 (from this District), cited in the case of Jackson *vs.* Jackson.

Assuming, then, as alleged in the pleadings, all of which are verified, that this property was at one time the property of the husband, yet as it was at some time given to the wife by the husband, the next of kin of the wife, their mother, are entitled to have the question of fact determined, namely, whether it has not become so much, and in such a manner, her separate estate as to bar the husband's rights to it entirely. The next of kin are entitled, under the statute of Maryland, to have these facts determined and spread upon the record, so as to make a proper record for the trial of these questions before the court, and for hearing on appeal in case the issues should be determined adversely to them. In the case of Dugan *vs.* Northcutt, 7 App. D. C., 357, one of the issues there raised in the settlement of the estate was: "The legitimacy of one of the distributees." And the court said:

"The sending of issues from the orphans' court is a matter of right to the parties in interest, which that court is not at liberty to refuse. The act of Maryland of 1798, chap. 101, subch. 15, secs. 16 and 17, is mandatory upon the subject, *and does not leave it to the discretion* of the court; and we have so held. (Citing) *In re* Estate of Atwood, 2 App. D. C., 74."

So that we respectfully submit that issues should be framed by the court for the trial of the questions of fact involved, and that this should be done before any final adjudication of the matters involved herein.

If it be suggested that the appointment of an administrator, even the husband, would not determine the right of the property, I respectfully submit that such would be the effect. The petition of the husband is framed on the theory that he is entitled to letters of administration because he is entitled to the estate, and he asks to be allowed to take the whole estate and give a special bond to pay debts. These allegations are denied by the answers of the

children, and thus one of the issues made in the case which should be determined first before letters are issued. The court has necessarily to adjudicate and determine on his petition that he is entitled to the estate before it could issue letters to him. What redress could the next of kin then have if they are entitled to the estate under the law? Who is then to institute a suit in their behalf? In order for them to sue for the property belonging to their mother's estate, they must do this through the administrator of their mother's estate. The act of Maryland of 1898, ch. 101, sec. 148, provides for the appointment of collectors for the preservation of the estate "In case of delay on account of * * * a contest relative to the right of administration, &c.," and further provides, sec. 153, "on granting of letters testamentary or of administration, the power of any such collector shall cease," &c. (Wheeler's Testamentary Law, 18 8 ed., pp. 70, 71, and 72).

If the husband is entitled to this personal property, he is entitled to it not by virtue of any letters issued to him by this court, but by virtue of his marital rights as husband, and then it is not necessary for him to obtain letters as administrator. If he is entitled
46 to it at all, his title is in fact stronger without letters than with them. The act of Maryland of 1898, ch. 101, subch. 5, sec. 8, provides that the husband, without first taking out letters of administration, shall have the right to sue in respect to all choses in action of the wife *which by law way devolve upon him*, and by the same statute the husband was required to set out in the pleadings specially "*the manner in which the debt or right accrued to the wife, and how the same devolved upon him.*" There are many choses in action belonging to the estate of the wife which the husband would not be entitled to sue for, such as damages for wrongful death of the wife, which damage is given to her next of kin by statute, and also, I respectfully submit, he would not, as surviving husband, be entitled to sue for any property which under the law would go and be distributable to her next of kin (Marshall *vs.* Bell, 6 How., 70, above).

I submit, therefore, that the application (petition) of the husband for letters of administration is improper, especially in the form in which it is now made, and he should either be required to file another or amended application (petition) or the present one dismissed. If a new or an amended application is filed, it should at least show, as required by the statute in pleading, the facts under which the property accrued to the wife and how the same now devolves upon him.

But it is most confidently submitted that under the allega-
47 tions of the pleadings (petitions and answers), as above set forth, there can be no doubt as to the right of the children to the personal property in question left by their mother. The Supreme Court of the United States, whenever it has spoken upon the subject, has said that the *separate estate of the wife*, acquired either from the husband or otherwise, since the act of 1869 does not pass to the husband after her death.

Sykes *vs.* Chadwick, 18 Wall., 141.
Stickney *vs.* Stickney, 131 U. S., 227.
Hitz *vs.* Nat. Met. Bank, 111 U. S., 722.
Jackson *vs.* Jackson, 91 U. S., 122.

In the above-cited case of Sykes *vs.* Chadwick, 18 Wall., 141, besides the declaration of the court in deciding that the note of the husband to the wife was good as creating a separate estate in her (quoted above), the court, speaking through Mr. Justice Bradley, say:

"The sole object of the statute (act of 1869) was to prevent his acquiring such interest in her property."

The only question in the present case at bar which the Supreme Court did not decide in the case of Sykes *vs.* Chadwick was whether the property (a promissory note) coming from the husband was the wife's separate estate, although they did decide that it could be enforced against him by her in equity; but this question of the separate estate of the wife of property *coming from the husband* has since been decided finally by the U. S. Supreme Court and our Court of Appeals.

Shea *vs.* McMahon, 16 App. D. C., 65.
Jackson *vs.* Jackson, 91 U. S., 122 (above).

48 If this, then, became and was at the time of her death the *separate property* of the wife (as alleged in the petition of the husband), he, as the surviving husband, has no right to it. In addition to the case of Marshall *vs.* Beall, above cited, the Supreme Court of the United States has again decided this question in the case of Prout *vs.* Roby, 82 U. S., 472. This last-mentioned case was where the wife, Jane Mallion, *took* a lease to real estate in the name of one Jonathan Porter, as trustee for her, the lease having been taken prior to the married woman's act of 1869, namely, in 1820, at which time she could not take the lease in her own name. It will be noted that the lease that she took, being leasehold property, was *personal property* belonging to her. The leasehold interest in the property which Jane Mallion (the wife) took was a lease for ninety-nine years, renewable forever, and as the real estate which she leased increased in value, the leasehold interest which she had (at a yearly rental payable by her of $25.80) became valuable, the rental value of the property being much greater than the rent which Jane Mallion was obligated to pay under her ninety-nine years' lease. Upon the death of Jane Mallion her husband, Vandora Mallion, who *survived her*, claimed the possession and control of the leasehold property and received the rents thereof less the $25.80 yearly rent under the ninety-nine years' lease. And he continued to receive the revenue from this leasehold property of the wife down to his death, which occurred in 1853. The distributees of the wife filed a bill claiming an accounting from the heirs and devisees of the husband, Vandora Mallion, and the court, in passing upon the questions at issue, say:

"No particular phraseology is necessary to create the provision for a *feme covert* technically designated in the law as her *separate estate.* As in all other cases of instruments to be construed, the
49 controlling test is the intent of the parties. That, in whatever language it may be clothed, constitutes the contract. Here

the meaning is so clear that no room is left for doubt. The intervention of the trustee and the power of disposition by will could have had no purpose but to give to the *cestui que trust* the same power over the lease as if she had been a *feme sole*, and to place it beyond the reach and control of her husband, both during her life and after her death. These facts are irreconcilable with any other view of the subject. No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption of control over the premises after her death was simply usurpation, and no right or title passed under his will to his devisee. What he did and what Knight did may therefore be laid out of view as of no legal consequence in the case. It is not shown that there is, or ever was, any personal representative of Jane Mallion. The maxim applies that what does not appear is to be presumed not to exist."

There were no particular words in the lease that Jane Mallion took other than those contained in an ordinary lease for ninety-nine years.

It further appears in the case that the appellant claiming under the husband effected a re-entry of the property, and the court, in passing upon this phase of the case, says:

"The re-entry of the appellant cannot avail him. If there had been a personal representative of Jane Mallion after her death, the title to the leasehold term being *personalty*, would have passed to and vested in him. There being no such representative, it fell into abeyance, and has since so continued. The covenant to convey passed by descent to the heir-at-law as if it had been contained in a separate instrument."

Under the common law the personal property of the wife became, not at the wife's death, but at the *time of* and *by the marriage*, the husband's, and his right to it *then* (at the time of the marriage) accrued, and he had the same right to sue for it in her own name during the marriage that he had after her death. The
50 United States Supreme Court, in passing upon this question, in the case of Stickney *vs.* Stickney, 131 U. S., 227, at page 238, say:

"The property (personal) no longer, as at common law, vests in her husband *by the marriage*. The act provides as follows:" (quoting the language of the married woman's act of 1869.)

"So far as her separate property is concerned, a married woman thus *becomes as absolute owner* as though she were unmarried."

In the next above case, the following cases of Hitz *vs.* National Met. Bank, 111, U. S., 729, and Mattoon *vs.* McGrew, 112, U. S., 713, were cited by counsel to sustain the view of the law which the court followed.

In the above case of Hitz *vs.* Nat. Met. Bank, the court, after quoting the married woman's statute of 1869, say:

"It is the right of a married woman to any property, *personal* or real, belonging to her at the time of marriage or acquired during marriage, which shall be as absolute as if she were unmarried and

shall not be subject to the disposal of her husband. It was the purpose of the statute to abolish this tenancy by the curtesy, or any other interest of the husband, in *all her* property, and to place her in regard to it in the condition of a *feme sole.* And it was this same property and not part of it, no separate interest or estate in it, which was exempted from liability for his debts. It would be queer construction of the statute, looking at its manifest purpose, to hold that it meant, though her property *shall never* come under his control and he shall acquire no interest in it and it shall never be liable for his debts, the use and possession, the rents and profits of it, may be made liable to his debts as long as he lives."

In the above case of Mattoon *vs.* McGraw, 112 U. S., 713, the court (Chief Justice Waite), speaking of the case of Hitz *vs.* Bank, say:

"The essential facts in this case are substantially like those of Hitz *vs.* Bank. That case was decided on full consideration, after an elaborate argument on both sides, and we are satisfied with the conclusions then reached."

51 *The Case of Chadsey v. Fuller*, 6 *Mackey*, 117.

There can be no doubt, from the language of the U. S. Supreme Court in the above-cited cases, of the views of that court on the effect and intent and the proper construction of the married woman's act of 1869, and the effect and meaning of that language is admitted by the court in general term of the supreme court of the District of Columbia in the case of Chadsey *vs.* Fuller, 6 Mackey, 117. The effect of it, however, is apparently avoided in the case of Chadsey *vs.* Fuller by the presumption that "it must be considered as mere *dictum* by which that court (U. S. Supreme Court) would not feel itself bound or expect us to be," and yet in the case of Mattoon *vs.* McGraw, 112 U. S., 713 (above) reiterated and confirmed its decision of Hitz *vs.* Bank. But in the case of Chadsey *vs.* Fuller, if it were sought to distinguish that case from or avoid the effect of its decision on the present case at bar, it might be said that it nowhere appears in the case of Chadsey *vs.* Fuller that the personal property of the wife involved therein was that acquired by her subsequent to the act of 1869. If the facts in that case showed that the property of the wife therein involved was acquired by her *prior* to the act of 1869 (and had not been given by the husband to the wife), it might, perhaps, very properly be held to have belonged to the husband, under his common-law rights as husband, immediately upon his marriage to her, and this right could have been enforced by him either during his marriage or after her death. But assuming that the property in question in the case of Chadsey *vs.* Fuller was the wife's property acquired *since* the act of 1869, it is respectfully submitted that the decision in that case is irreconcilable with the decisions of the U. S. Supreme Court where the proper construction of the language in question was as directly involved as in the case of Chadsey *vs.* Fuller.

52 But in the present case at bar it will be shown in evidence to be made of record in case issues are framed as to the ques-

tion of the title to this property that it was the earnings solely of the wife in her business and became her separate estate with the sanction and affirmative approval of the husband; that she, with his sanction, kept it separate from any property of the husband and exercised all acts of ownership over it as her separate estate, both subsequent and prior to the married woman's act of June 1st, 1896. So that it becomes necessary to determine title to this property not only under the powers and rights given to the wife under the act of 1869, but also under the more recent act of 1896. While under the decision of the U. S. Supreme Court in case of Jackson *vs.* Jackson, 91 U. S. 122 (above), these earnings became the property of the wife by the sanction of the husband, yet by the act of 1896 the power of the wife to acquire property from her husband was enlarged, as was held in the most recent decision on this subject by the U. S. Supreme Court (Hambleton *vs.* Rathbone, 175 U. S., 414, at p. 422).

The latest decision of our Court of Appeals, both on the proper construction of the married woman's act of 1869 and 1896, is the case of Wills *vs.* Jones, 13 App. D. C., 482, which followed the previous liberal construction of that court. The Court of Appeals in speaking of the proper construction to be given to both of these statutes (at p. 495) say:

"The time would seem, therefore, to have arrived when the courts should no longer give these statutes a narrow or illiberal construction, such as they may have heretofore received, but a broad and reasonable one, such as may best subserve the spirit and purpose of their enactment." * * * "The act of Congress of June
53 1, 1896 is a very great enlargement of the act of April 10, 1869, the main portion of which it purports in terms to repeal, but the substance of which, with broader powers, it undertakes to re-enact. As will be perceived, it specifically gives a married woman each and all the rights which the adjudications we have mentioned have held to have been denied to them under the previous statute. The act, so far as it relates to the subject-matter under consideration, is as follows:"

The words of the act of 1896 are then quoted by the court, and to which attention is now particularly called in contrast with the words of the act of 1869. In the case of Chadsey *vs.* Fuller, 6 Mackey, 117, at page 126, the court (through Mr. Justice Cox) lays great stress upon the word "rights" used in the act of 1869, as, for instance, "the *right* of a married women to any property," &c. It will be observed that the act of 1896 reads: "that the property, real and personal, which a woman * * * may own * * * shall *be and remain* her sole and separate *property*," &c. The act of 1896 speaks of the *property* of a married woman, and *not the right* of a married woman to it, and it seems that the decision of the court in general term turned upon this language (*i. e.*, "the right of a married woman") used in the old statute of 1869.

State Decisions.

The married woman's statutes of the various States of the Union are very similar to our statutes of 1869 and also of 1896.

In New Hampshire, the act of 1860, in reference to the separate estates of married women, provided that a married woman should hold "to her own use, free from the interference or control of
54 her husband, all property inherited by, bequeathed, given or conveyed to her." In a case in which the husband claimed the personal property of deceased wife, acquired by her since the passage of the act, the court held:

"That under the act of 1860, the husband was not entitled to take the personal estate of his deceased wife, dying intestate, notwithstanding that the previous act of 1846, which was not expressly repealed by the act of 1860, gave him such right; but that the estate went to the next of kin according to the general law regulating distribution of intestates' estates."

Woodman *v.* Woodman, 54 N. H., 226.

In the State of Connecticut the separate estate of a deceased wife goes to her administrator, not to the surviving husband.

Baldwin *v.* Carter, 17 Conn., 201.

In the State of Ohio the husband may administer on the estate of the deceased wife, but must account not *only to her* creditors, but also to her *next of kin*, according to the statute of descent and distribution of that State.

Curry *v.* Fulkinson, 14 O., 100.

In the State of Arkansas, under a provision of the statute of that State which is very similar to our statute, although not so liberal in its language to married women, it was held that a husband has no right to choses in action of deceased wife, unless he reduces them to possession during coverture.

Cox *v.* Morrow, 14 Ark., 604.

55 In the State of Iowa, under a law similar to ours, it was held that the property of a deceased wife goes to her administrator, not to the surviving husband.

Wilson *v.* Breeding, 50 Ia., 629.

In the State of Alabama, where administration on the estate of a deceased wife was granted to a person designated by her children and the husband applied to have the letters revoked and himself appointed administrator, the court held:

1. That the husband was not entitled to administer on his wife's estate, that right not being given him by the statute, regulating appointment of executors and administrators, which gave it to the widow or next of kin of deceased, he not being next of kin.

2. *That the husband had no interest in his deceased wife's estate as distributee.*

Randall *v.* Shrader, 17 Ala., 333.

The husband has no right to deceased wife's choses in action when they have not been reduced to possession during coverture.

Welch *v.* Welch, 14 Ala., 76.

No title to the personalty of the deceased wife passes to the husband.

Nelson *v.* Goree, 34 Ala., 581.

In the State of Illinois, where a husband allowed his wife to receive and enjoy the rents and profits of her lands, which rents and profits were paid to her in kind (personal property), the court held that in equity he was obliged to account to the wife's admin-
56 istrator after her death for the *the* proceeds of her estate (personal property) in his hands.

Gill *v.* Woods, 81 Ill., 64.

It is respectfully submitted that before any final action is taken by the court upon any of the petitions filed in this matter that issues should be framed to try the questions of fact in dispute between the parties as hereinbefore suggested.

CHAPIN BROWN,
Attorney for Next of Kin (Children).

(Endorsement: Brief and authorities. Filed Dec. 23, 1901. Louis A. Dent, register of wills, D. C.)

57 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of MARY T. MCCARTHY, Deceased. No. 10295.

Application for Letters of Administration.

Brief in behalf of the applicant, James F. McCarthy, surviving husband.

Statement of the Case.

The facts are as follows: Mary T. McCarthy, a married woman, died in the city of Washington on July 1, 1901, leaving surviving her James F. McCarthy, her husband, and Jeremiah F. McCarthy, of Indianapolis, Indiana; Mary McCarthy Daley, John J. McCarthy, and Katie McCarthy Brennan, of this city and District, all of whom are her children. At the time of her death there was deposited to her credit with the National Bank of Washington a sum of money amounting to $4,425.00. The said Mary T. McCarthy died intestate on the date aforesaid, and on July 23, 1901, James F. McCarthy, her husband, filed his petition for letters of administration on her estate, making the said children and next of kin respondents thereto and claiming that as husband he is entitled to all the personal property of said decedent after payment of her debts. The

children in their answers, with the exception of Katie McCarthy Brennan, who has consented to her father's application, allege that this fund is a portion of the separate estate of said decedent, and that as her next of kin they are entitled thereto; they deny the right of the husband and father to the same, and also allege that he is unfit to be administrator on account of an alleged
58 fondness for intoxicants and lack of business qualifications.

Their allegations are unsupported by a single affidavit to give them color of truth. Jeremiah F. McCarthy, the eldest son, and Mary McCarthy Daley, the eldest daughter, also file their separate petitions for letters of administration on said estate, making the same allegations as to the separate property. In his answer to these petitions, James F. McCarthy, the husband, alleges that this fund is money that was made by him in his business and allowed to be deposited by his said wife in her own name, in accordance with a custom dating back to the time of their marriage in 1854, and denying that it was ever intended to be and become her separate property and estate; he denies also the allegations that he is unfit to be administrator on account of his habits. His allegations are supported by the affidavits of several persons, who state that they have known him for not less than twenty years.

Argument.

In considering this matter we are confronted by these propositions:

1. What are the rights of the husband, according to the common law, in the personalty of his wife upon her decease intestate?

2. How and to what extent have these rights of the husband been altered or repealed, if at all, by legislative enactments creating the separate estates of married women?

3. Is the husband in the present case fit or unfit to perform the functions and duties of administrator?

The first two of the propositions have been admirably and exhaustively considered by counsel in their briefs and the court in general term in their opinion in the cases of Chadsey *v.* Fuller and *In re* estate of Mary J. Landric, both decided in one opinion, and reported in the 6 Mackey, 117. The opinion of the court in that case is the most forceful argument that could be put forth in behalf of the application of the husband in this present case.

59 I.

What are the rights of the husband, according to the common law, in the personalty of his wife upon her death intestate?

It is contended in this case, in behalf of the husband, that after the payment of her debts he is entitled to all of her personal property. As to choses in possession, there can be no question. The doctrine is so old as to preclude argument. Chattels, personal or movable goods, belonging to the wife at the time of her marriage, or given to her afterwards, became the absolute property of her husband, in the same manner precisely as if they had been originally

his own, or had been subsequently given to him. He might dispose of them as he pleased in his lifetime, or by his will; they were subject to his debts; and if he died intestate the wife had no further claim to them than to any other of his effects.

Darlington's Personal Property, 343.
Co. Litt., 300*a*; Bac. Abr., tit., Baron and Feme (C), 3.
1 Rop. Husband and Wife, 169.
2 Blackstone's Commentaries, 435.

With regard to choses in action, it is equally well settled that if the husband reduces the choses in action into possession during the coverture they become his absolutely. If the husband died before the wife, she became entitled by survivorship to such choses in action as were not reduced by him into possession, "*but if the wife should die before her husband, these choses in action still remaining unreduced, formed part of her personal estate; and her husband must have taken out administration to her effects before he could proceed to recover them; they, with the rest of her personalty, belonged to himself absolutely after payment of her debts.*"

Darlington's Personal Property, 345.
Statute 29, Charles II, chap. 3, sec. 25.

At common law the husband was entitled to be administrator of his wife and in that capacity to recover things in action.

2 Blackstone'- Commentaries, 435.
Whitaker *v.* Whitaker, 6 J*hons*., 117.

Originally administrators held the property of their de-
60 cedent for their own use, and it was not until the passage of the statutes 22 & 23, Charles II, that the personal estate was required to be distributed among the next of kin after payment of debts. This statute is known as the statute of distributions. The statute 29, Charles II, cited above, specially exempted the estates of married women from the operation of this act, providing that as to *femes covert* who should die intestate their husbands should have administration of their rights, etc., and to recover and enjoy the same as they had done before the passage of that act. The doctrine of the common law as herein stated, we apprehend, will not be disputed, and the rights of the husband in the present instance would be plain were it not for the passage of what is known as the modern married woman's act. This brings us to the second proposition.

II.

How and to what extent have these rights of the husband been altered or repealed, if at all, by legislative enactments creating the separate estates of married women?

From the foregoing it appears that at the common law the husband was entitled to administer the estate of his intestate wife, and by reason of being so entitled he became absolutely entitled to all her personal property. In aid and confirmation of this common-

law right we have the act of Maryland of 1798, ch. 101, subch. 5, secs. 8 and 9, which provide substantially that "*if the intestate be a married woman it shall not, as heretofore, be necessary for her husband* to take out letters of administration, but all her choses in action shall *devolve upon her husband in the same manner as if he had taken out such letters*," and that the husband might bring an action to recover in right of the wife either before or after her death. It is contended on behalf of the husband in this case that this act of Maryland in conjunction with the common law are in force in this District, and unaffected by any provisions in the acts in relation to the separate estates of married women, and that he is, therefore, entitled to his wife's personal estate absolutely, after payment of her debts, and is entitled to letters of administration in order to recover this fund, even though declared to be "not necessary," from the bank where it is withheld from by reason of this contention.

The first act known as the married woman's act in this
61 District is the act of Congress of April 10, 1869, secs. 727 to 730 R. S. D. C., which provides that "the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from the husband, shall be absolute as if she were unmarried, etc.," and gave her power to devise, bequeath, and convey the same as if she were unmarried, Exactly the same contention that is now made in this case, viz., that the husband had no right in the separate estate of his intestate wife, was made in the cases of Chadsey *v.* Fuller and *In re* estate of Mary J. Landric, decided by the supreme court of this District, sitting as a general term, and reported in 6 Mackey, 117. This case was argued by distinguished counsel, one of whom is now on the bench, and considered by the whole court, at that time, with one exception, and the decision of Justice Cox, speaking for the court, is apparently unanimous, no dissenting opinion appearing of record. Upon the question of the inconsistency of the husband's common-law rights with the married woman's act Mr. Justice Cox, at page 125, says: "But if the wife should die leaving personalty, without having attempted to dispose of it by will or otherwise, a state of things is presented in regard to which the statute is *entirely silent*, there is nothing in it inconsistent with the previous law applicable to that case. The wife may have unlimited *control* during her life but this is *entirely consistent with the husband's right of succession after her death*, if she has retained her property and chosen to die intestate.

There is therefore, no repeal, by implication, of the act of 1798, which would be the result of an inconsistency between that and the act of Congress. And this conclusion is certainly in harmony with the manifest object of the law. The evil of the old law was that the wife's property during her lifetime was at the mercy of her husband and liable to be wasted by him to her detriment; *but it never was considered an evil that her relatives, perhaps collaterals in a remote degree, were not preferred in the succession to the husband.* The law aimed at the protection of the *wife, but it — hardly conceivable that*

the law-makers' solicitude extended to her relatives. The title of the original act was "an act to regulate the rights of property of married women, etc." *While it declares that the right of any married woman to her property should be as absolute as if she were unmarried, it nowhere declares that the rights of her heirs or next of kin, in the event of her death, shall be the same, or that her estate shall descend or be distributed in like manner, as if she were unmarried.*

62 And no such idea is involved in this definition of her rights, because the question of succession pertains to the rights of her heirs and next of kin and not to hers. As was well said in Vallance *v.* Bausch, 28 Barb., 633, "The right of succession is not a *right* but an incident of property, given to it by law."

It follows, therefore, that statutes in favor of married women being silent as to the distribution or destination of their separ-te estates after their death do not alter or change the common law governing in such case, and the husband's common-law rights must prevail. A similar principle is involved in the case of marriage settlements where by the terms of the settlement no provision is made for the distribution of the estate after the wife's death. In such case it has been held that the husband's common-law rights attach, and he is entitled absolutely to this property as to all her other property.

Marshall *v.* Beall, 47 U. S., 6 How., 80.
Barnes *v.* Underwood, 47 N. Y., 351.
Stockett *v.* Bird, 18 Md., 484.
Rausch *v.* Nichols, 22 N. Y., 110.
Stewart *v.* Stewart, 7 Johns. Ch., 245.
Brown *v.* Brown, 6 Hump., 127.
Cooney *v.* Woodburn, 33 Md., 328.
White *v.* Brown, 1 Md. Ch., 192.

"When a *feme covert* dies her separate property ceases to be such, and stands on the same footing as any other property she may have owned."

Davis *v.* Smith, 21 Am. Law Reg. N. S., 163.

Justice Cox, on this subject, in Chadsey *v.* Fuller, *supra*, says: "And so we think that the object of our statute is attained, at least in relation to personalty, which is the subject of the present discussion, if we hold its effect to be *simply to suspend the husband's common-law and statutory rights during coverture and to subordinate them also to the wife's power of disposal.* In this view we are sustained by decisions on similar statutes."

Stockett *v.* Bird, *supra.*
Rauson *v.* Nichols, *supra.*
Barnes *v.* Underwood, *supra.*

There is no difference in princip*al* whether this suspension of the husband's rights is caused by a separate estate based upon an agreement between husband and wife or by statutory provisions. The same rule should prevail.

63 Commenting on the case of Hitz *v.* National Metropolitan Bank, 111 U. S., 722, upon which great reliance was placed in the case of Chadsey *v.* Fuller, *supra*, and which is also brought forward as authority in this case, Mr. Justice Cox says: "Nor are we in the least degree embarrassed by the language of the Supreme Court of the United States in the case of Hitz *v.* Bank, etc., to the effect that 'it was the purpose of the statute to abolihs this tenancy by the curtesy or any other interest of the husband in all her property, and to place her in regard to it as a *feme sole.*' In that case the husband had not become tenant by the curtesy, as the wife was still living. His rights to *to* the rents and profits of his wife's realty during coverture had accrued before the act of 1869 was passed, and was not in question, but was conceded. *The only question before the court was whether this acknowledged common-law interest of the husband could be subjected to the claims of his creditors.* It is manifest that the facts of the case did not call for the expression of an opinion on the effect of the husband's rights as against his wife or her heirs or next of kin.

* * * * * * *

The general language of the court must therefore be construed as referring only *only* to *rights existing during the wife's life,* or if it has a more extended meaning it must be considered as a mere *dictum,* by which that court would not feel itself bound or expect us to be."

Chadsey *v.* Fuller, *supra,* pp. 129, 130.

Upon the question of the purpose of the act of April 10, 1869, the Court of Appeals says: "This statute was confessedly intended to *emancipate* the property of married women from the *control* over it which was given to their husbands by the common law."

McCormick *v.* Hammersley, 1 D. C. App., 316.

"The effect of the common law was to suspend the wife's *control* over her estate and to vest it to a great extent in the husband. This *control* the statute restores to her, but the statute does not seek to modify the relation of husband and wife to each other."

Idem, p. 317.

Cites in support the following:

Seitz *v.* Mitchell, 94 U. S., 580.

Kessner *v.* Trigg, 98 U. S., 50.

64 While the power of disposition is given to the wife under the act of 1869, *she must exercise that right during her lifetime,* either by deed or will, otherwise upon her death, as was said in the case of Davis *v.* Smith, *supra,* her separate property stands on the same footing as any other property she may have owned and the husband's common-law rights attach to it if she fails to exercise this right of disposition.

In the case of Uhler *v.* Adams, 1 D. C. App. pp., 398, 399, 400, upon the question as — whether or not the estate by the curtesy is abolished by the act of 1869, the court says: "The statute does not

purport by any express provision to abolish tenancy by the curtesy, and we do not find in it any provision that by necessary implication would have that effect. The act unquestionably gives the married woman the power to destroy it, either by the conveyance of her estate by deed or devise of it by will. *But if she fails to use the power thus restored to her and dies seized of the property and intestate, there seems to be no good reason why the well-established rules of law that direct the devolution of estates should not apply in this as in other cases.*

By the common law, upon the death of a married woman who has had children by her husband, two separate and distinct interests are carved out of her estate—one an estate for life in her surviving husband and the other a reversion in fee in her heirs. She may prevent either or both by her will or by her deed. She may dispose of the property as she pleases. *But there would be just as much reason for supposing that the reversion in the heirs was abolished by the statute as the tenancy by the curtesy. Both are created equally by express provisions of the law; or at least both depend equally upon express provisions of the law for their recognition, and there is nothing either in the letter or the spirit of the married women's act that requires us to consider as antagonistic to it the continued existence of the one any more than the continued existence of the other.* We presume no question would ever have been raised on this point were it not for a casual expression, apparently to the contrary of this view, that occurs in the opinion of Mr. Justice Miller, speaking for the Supreme Court of the United States, in the case of Hitz *v.* Metropolitan National Bank, 111 U. S., 722. He says: 'It was the purpose of the statute to abolish this tenancy by the curtesy, or any other interest of the husband, in all her property, and to place her in regard to it in the condition of a *feme sole.*' But that able and eminent jurist was speaking expressly of tenancy by the curtesy inchoate and the interest of a husband in his wife's estate at common law
65 *during the lifetime of the wife;* and the context shows plainly that his statement as to the effect of the act must be confined to the husband's common-law interests as affecting the wife's rights and powers and control over her estate. It was undoubtedly the purpose of the statute to abolish all interest, powers and estate of the husband that militated against the right of the wife to hold and dispose of her estate as she thought proper. *But certainly it cannot in reason be maintained that a married woman's right to her property is any the less absolute because the law, after her death, makes provision for its disposal, when she herself has failed to make any disposition of it during her lifetime.*

Statutes similar to our own have been enacted in nearly all, if not actually all, the States of our Union; and the general current of authority in their construction of their terms on this point *are*, we believe almost unanimous.

Rice *v.* Hoffman, 35 Md., 344.
Proll *v.* Smith, 2 Vroom, N. J., 244.
Comer *v.* Chamberlain, 6 Allen, 166.
Long *v.* Hitchcock, 99 Ill., 550.
Neely *v.* Lancaster, 47 Ark., 175."

The reasoning of the Court of Appeals in the above case is in keeping with the reasoning of Mr. Justice Cox in his decision of Chadsey *v.* Fuller, both being based upon the fact that no provision is made in the act for the abolition either of the husband's curtesy or his rights in her personal estate upon her death intestate. And the avenue of reasoning by which the court arrived at the conclusion that the curtesy of the husband is not abolished by the act is applicable with equal force to the contention that his rights in her personal property upon her decease intestate have not been abolished. Under the act she has the right to defeat him, but if she does not exercise that right his right of succession will attach.

That the Maryland act of 1798, ch. 101, subch. 5, secs. 8 and 9, *are* in force in this District and also the right of the husband to the personalty of his wife intestate are both recognized by the Court of Appeals in a later case.

Ferguson *v.* R. R. Co., 6 D. C. App., 525.

Has there been any change in the law of the District in regard to the question under consideration in this case since the decision of the case of Chadsey *v.* Fuller? The only other statute upon the question of the property of married women is the act of
66 Congress approved June 1, 1896. In some respects this act is wider than the act of 1869, viz., as to the wife's right to her earnings and her right to trade, but in other respects it is narrower. In the law of 1869 a married woman may convey and devise her property "as if she were unmarried," while in the act of 1896 it is provided that she may convey, etc., "in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." This would seem to indicate an intention that the husband's rights in his wife's property and the wife's rights in her husband's property should be preserved in each. In some respects the husband cannot defeat his wife's rights in his property, and, if his wife is to deal with hers as he deals with his, it is questionable whether she would have the power to defeat his rights. An inspection of this act, however, of the merest kind will disclose instantly that it makes no change in the husband's rights in his wife's property upon her death intestate. It contains no provision as to the destination or distribution of her property after her death intestate, being as absolutely silent upon that question as the act of 1869; hence it must be held to have made no change in the law of the District in that respect, which is the question under consideration in this case. It must also be held that the husband's common-law right to the personalty of his wife, who is deceased intestate, is unrepealed by this act and in full force, and under the decision in the Chadsey *v.* Fuller case the husband, James F. McCarthy, is entitled to administration on the estate of his deceased wife, Mary T. McCarthy, and is entitled to all her personal property to the exclusion of her children.

III.

Is the husband in the present case fit or unfit to perform the functions and duties of an administrator?

This is a question which it is not material for this court to consider. Under the law the fund in this case undoubtedly belongs to the husband, and, this being so, the next of kin, even though children of the deceased, are in the position of mere strangers before this court. They have no standing which this court should recognize, and, having no interest in the fund, they are absolutely disqualified to raise the question of the fitness or unfitness of the husband to administer. A creditor might do this, but they can-
67 not. There is nothing in this case, however, tending to show the alleged unfitness of the husband except the bare allegations in the answers of three of the children to their father's petition. These allegations are not fortified by a single affidavit. There are, however, on file the affidavits of several reputable people which exonerate the husband from the charges made against him. In this case the children are endeavoring to deprive an old father of money that is well known to them to have been made by him in his own business, and the court should carefully scrutinize their allegations before accepting them. To appoint another person administrator would mean to deprive the husband of a considerable portion of the fund, which would be paid out in commissions, and to which he is rightfully entitled under the law. There would be absolutely no reason for such appointment. This property is now the separate property and estate of the husband, and, being capable of doing so, he should be left to manage his own property for himself, unless his unfitness is conclusively shown, which is not even attempted and would not be proper in this case. On the other hand, if the court should hold that this fund belongs to the next of kin, which is so highly improbable as to call for little consideration, then the husband would be out of the question and there would be no necessity to inquire into his fitness or unfitness for an office to which he had no right or title.

In conclusion it is urged that since the decision in the case of Chadsey *v.* Fuller there has been no change in the law of this District inconsistent with or in repeal of the right of the husband, at common law, to the personal property of his wife upon her decease intestate. The statement of the Supreme Court of the United States in the case of Hitz *v.* Bank, which is produced as authority, and upon which great reliance is placed in this case, has been explained, by both the court in general term and the Court of Appeals, as referring to the rights of the husband in the property of his wife *during her lifetime*, or as being a mere dictum, not binding on any court. This isolated statement is the only authority that can be produced in this District in derogation of the husband's right. The law upon this subject as it is declared in the case of Chadsey *v.* Fuller is undoubtedly correct, and the process of reasoning which brought the court to its conclusion in that case is followed, although

analogously, by the Court of Appeals in a later case, namely
68 Uhler *v.* Adams, which is upon a similar question. These decisions are universally recognized as the law in this District and are binding upon and should be followed by the court in this case.

Respectfully submitted.

SHEEHY & SHEEHY,
Attorneys for James F. McCarthy.

(Endorsement: Brief in behalf of the application of the husband, James F. McCarthy. Filed Oct. 15, 1901. Louis A. Dent, register of wills, D. C.)

69 DISTRICT OF COLUMBIA, *To wit:*

Supreme Court of the District of Columbia, Holding a Probate Court.

I, Louis A. Dent, register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 37, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 10295, estate of Mary T. McCarthy, deceased, wherein Mary McCarthy Daley, John J. McCarthy, and Jeremiah F. McCarthy are appellants and James F. McCarthy is appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation and notices of counsel filed therein and made a part hereof, and the pages from 38 to 68 to be true copies of the briefs of counsel filed in said cause.

I further certify that the bond for appeal, in the penalty of five thousand dollars, was duly filed by said appellants, and approved by said court on the 14th day of January, A. D. 1902.

In testimony whereof I hereunto subscribe my name and affix the seal of the said probate court this 21st day of February, A. D. 1902.

{ Seal Supreme Court of the District of Columbia, Probate Jurisdiction. }

LOUIS A. DENT,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1184. Jeremiah F. McCarthy *et al. vs.* James F. McCarthy. Court of Appeals, District of Columbia. Filed Feb. 21, 1902. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

MAY TERM, 1902.

No. 1184.

2 SPECIAL CALENDAR.

JEREMIAH F. McCARTHY, ET AL.

vs.

JAMES F. McCARTHY.

Additional Brief on Behalf of Appellants.

NOTE.—Briefs were filed in the court below in the argument of the case and are printed in the Record. The brief of appellants will be found at page 24 printed Record.

CHAPIN BROWN,

Attorney for Appellants.

LAW REPORTER PRINT, WASHINGTON, D. C.

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JEREMIAH F. McCARTHY ET AL.

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Additional Brief on Behalf of Appellants.

NOTE.—Briefs were filed in the court below in the argument of the case and are printed in the Record. The brief of appellants will be found at page 21, printed Record.

STATEMENT OF THE CASE.

Mary T. McCarthy died in the District of Columbia on the 1st day of July, 1901, leaving a personal estate amounting to four thousand four hundred ($4,400) dollars and upwards, and also leaving real estate situate in the District of Columbia and in the city of Washington, and known and described as lot numbered four (4) in square six hundred and fifty (650), worth about two thousand ($2,000) dollars, improved by a brick dwelling house. For many years prior to her death she conducted a saloon business, and from this saloon business she accumulated considerable property, both real and personal, including the above-mentioned property, that she owned at the time of her death. The real

estate at the time of her death stood in her name on the land records of the District of Columbia, and the personal property, so far as admitted by the husband to exist at the time of her death, was in the shape of money and deposited in the name of Mary T. McCarthy, the decedent, in the National Bank of Washington of this city. This property, both real and personal, was recognized as belonging to her by her husband, James F. McCarthy, the appellee (see page 3, printed Record, Secs. 4 and 5 of the petition of the appellee, James F. McCarthy).

It appears further from the sworn statement in the pleadings of the said James F. McCarthy, the appellee, in his answer to the cross-petitions of Jeremiah F. McCarthy and Mary McCarthy Daley, that he denies, notwithstanding his previous sworn statements to the contrary in his original petition, that the said money was the property of his wife, the said Mary T. McCarthy, the decedent; and also says that it was the proceeds and profits of the business conducted by the appellee, James F. McCarthy, the husband of the decedent, for many years, in the city of Washington, and in which the said decedent, his wife, aided and assisted him (see page 12, printed Record, at the top of the page).

The decedent, at the time of her death left surviving her, in addition to the appellee, her husband, four children, namely: Jeremiah F. McCarthy, a son; Mary McCarthy Daley, a daughter; and John J. McCarthy, a son—the last three appellants herein—and also Katie McCarthy Brennan, a daughter. The court below, on the pleadings alone, and without taking any testimony, appointed the appellee, the husband, administrator of the estate. From this decree the appeal is taken. It is claimed by the above-named appellants that they, and not the surviving husband, are entitled to the personal property left by the decedent, after payment of debts.

ASSIGNMENT OF ERRORS.

The court below erred:

1st. In not directing a plenary proceeding to be had by bill or petition, as required by the appellants (see printed Record, page 22).

2d. In refusing to frame issues to try the questions of fact in dispute between the parties (see printed Record, pages 22 and 32).

3d. In holding that the personal property of the decedent belonged to the husband, the appellee (see printed Record, pages 20 and 21).

4th. In appointing the appellee, the husband, administrator (see printed Record, pages 19 and 21.)

ARGUMENT.

First. The court below erred in not directing a plenary proceeding to be had by bill or petition as required by the appellants.

Second. In refusing to frame issues to try the questions of fact in dispute between the parties.

It is stipulated by counsel for the respective parties—

> "that the briefs of the attorneys of record for the respective parties which have been filed in the office of the Register of Wills may be used in argument in the case in the Court of Appeals in the District of Columbia, for the purpose of showing to the said Court of Appeals the matters and claims presented in argument to the Supreme Court of the District of Columbia." (Printed Record, page 1. Stipulation of counsel).

It was claimed below on behalf of appellants that there were allegations in the pleadings, the several cross-petitions

and answers of the husband and of the next of kin (children) of the intestate, raising issues which are necessary to be determined in the manner provided by law (by issues framed) before the case was ready for hearing upon the question as to whom should be appointed administrator (printed Record, pages 21 and 22, Brief of authorities and argument on behalf of the next of kin). On this branch of the case the court is respectfully referred to the brief of counsel for the appellants filed in the case below and printed in the Record at page 21, etc. The old law of Maryland, which was in force when these proceedings were first begun, is emphatic and mandatory and the sending of issues from the Orphans' Court for trial is a matter of right to the parties in interest which the court is not at liberty to refuse.

Dugan *vs.* Northcutt, 7 App. D. C. 351, and the other cases cited in the briefs of counsel, at page 22 of the printed Record.

Third. The court below erred in holding that the personal property of the decedent belonged to the husband, the appellee.

While it is still a mooted question whether, under the law prior to the adoption of the Code, the husband took all of the personal property of the wife, yet it is settled beyond any doubt that he did not take that property which had been settled upon her as her sole and separate estate, either by himself or by others.

Marshall *vs.* Beall, 6 How. (U. S.) 70.

Ward *vs.* Thompson, 6 G. & J (Md.) 349 (Brantly's Notes).

The next above case of Ward *vs.* Thompson is exactly in point. To the same effect, also, is the case of—

Allen *vs.* Humphreys, 8 Prob. Div. 16.

See, also, Prout *vs.* Roby, 15 Wall. 472.

Jackson *vs.* Jackson, 91 U. S. 122.

This case of Jackson *vs.* Jackson treats of what acts on part of the husband will be treated as a release of his marital rights in the property of the wife. Also the cases of—

Saxton *vs.* Wheaton, 8 Wall. 229.

Dorsett *vs.* Marshall, 5 Cr. C. C. 96 (in equity).

Following the principles settled in these cases the facts in this case, as far as they are developed by the pleadings, show that the husband and wife conducted this saloon business jointly, the wife being the active person in the business; that with the husband's knowledge and consent the money was given to the wife and treated as hers absolutely by him during all of her life and even after her death (printed Record, p. 3).

Under this state of the pleadings it was claimed below by the appellants that the court should frame issues to be tried by a jury to determine the question of fact whether the husband had not so settled this property upon the wife so as to make it a sole and separate estate that would pass to the children and not to the husband, at her death; but the court below, without giving an opportunity to have the evidence taken and the facts concerning these allegations as alleged in the pleadings proven, passes not only upon the law, but has assumed certain statements in the pleadings to be facts. We submit that these questions should have been submitted to a jury.

Fourth. The court erred in appointing the appellee, the husband, administrator.

It is not necessary to decide now whether the husband as such, could or could not be appointed administrator of the wife's estate, but it is claimed that at this stage of the proceedings it was improper and illegal to appoint the husband or any other person. If it were necessary to preserve the fund, collectors could have been appointed until the final determination of the facts raised by

the pleadings. If it should be determined by the facts on which issues should be framed, that the husband had relinquished his claim to his wife's estate, then it is clear that he should not be appointed administrator. On this branch of the case the court is respectfully referred to pages 23 to 32, printed Record, Brief of counsel for the appellants, filed in the case below, and also to the above cited cases of Ward *vs.* Thompson, 6 G. and J. 349, (Brantly's Ed. and Notes) and Allen *vs.* Humphreys, 8 Prob. Div. 16.

It is further submitted that the husband should not have been appointed at all, because, if he is entitled to this personal property of his wife, he is entitled to it not by virtue of any letters issued to him by this court, but by virtue of his marital rights as husband. As to this point the court is respectfully referred to the authorities cited and the argument of counsel at page 26 of the printed Record, and also to the above cited case of Dorsett *vs.* Marshall, 5 Cr. C. C. 96. There appears to be no authority in the court to issue letters of administration to the husband as such husband.

Other facts, raised by the pleadings, were in dispute between the parties on, and concerning, which testimony should have been taken and issues should have been framed for trial as shown by the pleadings, and concerning which issues were demanded by the appellants and refused by the court below as shown by the record and briefs of counsel for the appellants printed in the record. It is claimed that this also was error on the part of the court below.

It is therefore submitted to the court that the decision of the court below should be reversed and the case remanded, with directions to frame issues for trial of the facts before a jury.

CHAPIN BROWN,
Attorney for Appellants.